



DEBORAH SEILER
Registrar of Voters

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County of San Diego

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April 6, 2009

Office of Administrative Law
Reference Attorney
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

Re: Proposed Emergency Regulations Readoption File No. 2009-0324-01EE

Dear OAL Reference Attorney:

As the Registrar of Voters for the County of San Diego and as a member of the Secretary of State's (SOS) Post Election Manual Tally (PEMT) Working Group, I am writing to object to the proposed readoption of emergency regulations: "Post Election Manual Tally Requirements in Close Contests" submitted on April 3, 2009.

I am writing as a 30-year veteran of elections administration, with service ranging from the SOS office, to the State Legislature, to the private sector, to county government. My objections stem not only from this long history in election administration, but also from my direct experience with the PEMT in the November 2008 election. In addition, though I do not speak on behalf of the PEMT Working Group, my objections also arise from my participation in that group.

PEMT Working Group Does Not Support the Proposed Regulations

In her submission, the SOS claims that the Working Group "met via conference call regularly for the past eight weeks..." In fact, the SOS cancelled the majority of the calls that were scheduled. During the sporadic calls actually held, members of the group were unanimous in their opinion that the PEMT combines post election manual tallies and recounts in a manner that is inconsistent with current law and that cannot produce a meaningful outcome.

On February 27, 2009, five members of the group sent a letter to the SOS detailing their objections, a copy of which is attached. The letter clearly outlines the logical gaps and demonstrates how the PEMT is inconsistent with statutes that require a 1% post election manual tally and those allowing for recounts. To date, the SOS has not responded to this letter or addressed the issues it raised.

The SOS Has Failed to Identify a Certain Funding Source for the PEMT

Government Code section 11349.1 (3)(A)(B)(C)(D) requires a regulation to be rejected if it does not cite a funding source in either the Budget Act, a bill appropriating funds, or a funding approval letter or proof of funding augmentation from the Department of Finance. The SOS has merely checked a form to signal her intent to request funding which does not comply with this statutory requirement.

In the current economic environment, it is highly unrealistic to expect the Legislature will appropriate any funding to reimburse cities and counties for the costs incurred in complying with the PEMT requirements. The San Diego County ROV is currently owed over \$1.2 million in SB 90 reimbursements for mail ballot voting, voter outreach, and permanent vote-by-mail voting, among other mandates, from FY 07-08. This sum does not include the amounts we will be owed for FY 08-09 and FY 09-10 when reimbursement prospects are expected to be equally bleak.

The potential cost of the PEMT to San Diego County could exceed a half million dollars, adding significantly to the substantial debt already owed by the state.

Further, the SOS has not demonstrated a commitment to funding this program for the current fiscal year in which counties have already incurred over \$668,000 in PEMT expenses. To the best of our knowledge, no request for funding has been submitted to the Legislature or the Department of Finance to reimburse counties for this amount.

The SOS has Consistently Underestimated the Cost of PEMT

In October 2008, the SOS represented to OAL that the statewide cost of the PEMT would be only \$20,000 despite objections by counties that this amount was grossly underestimated. The \$20,000 estimate was based on the actual amount incurred in the June 2008 primary election in which few contests were on the ballot and the PEMT was triggered in only 19 precincts in five counties. As it turned out, the actual cost for the November 2008 election exceeded \$668,000 which is 33 times greater than the SOS estimate.

In a letter dated October 14, 2008, San Diego County Counsel informed OAL that statewide costs could exceed \$1 million, and in fact this prediction was far closer to the actual amount. Although San Diego's PEMT costs for the November 2008 election were a comparatively small number (\$6,000), they approached \$400 per precinct. If San Diego were involved in a PEMT that escalated to encompass all precincts, the potential liability would exceed \$500,000 for our county alone.

Although the proposed regulations lower the percentage requirement for certain contests, the escalation requirements are so stringent that 100% escalation is a real possibility.

If all precincts in the state were included, due to the escalation requirements in the proposed regulations, PEMT costs could exceed \$10 million, or nearly 15 times the current SOS prediction.

Not only does the current cost estimate fail to account for the possibility of a full escalation in a statewide election, but it completely ignores the fact that counties are conducting many special local elections which are subject to the 10% PEMT provision because they are likely to be conducted in jurisdictions with fewer than 100 precincts. In San Diego County alone, special local elections are scheduled for May 5, May 19, and August 25, 2009. In 2007, the County conducted six special local elections, and in 2008 it conducted two local elections in addition to the three statewide elections.

Reasonable Alternatives to the PEMT Exist

1. Parallel Monitoring

Previous secretaries of state have conducted parallel monitoring in which voting equipment is selected at random for testing on a separate machine. These tests have shown the equipment to be 100% accurate in all tests performed, and the cost of this testing is both predictable and controllable.

2. Canvass Procedures

Counties have raised two critical objections regarding the PEMT. The first is that it is triggered by a count which includes only 75% to 80% of the vote because it is based on Election Night results. The other is that it must be performed during the 28-day post election canvass period when counties are struggling to count mail and provisional ballots received at the polls, balance the number of ballots cast to signatures in rosters, and balance the number of votes recorded in the system to the number of mail, provisional, and precinct ballots received.

The PEMT serves only to disrupt this critical process and to deprive counties of the time and resources necessary to accomplish these tasks in a careful, precise manner. Indeed, the examples of ballot tabulation errors cited by the SOS in her justification were all detected and resolved in the canvass process.

The SOS could explore best practices and encourage counties to implement canvass procedures that will ensure this balancing process detects any operator or system errors.

3. Automatic Recount

Some states have laws which require an automatic, taxpayer-funded recount when the vote margin in a contest falls under a certain percentage or threshold. The advantage of this approach is that it is done after all ballots have been counted and the canvass process is complete. The California Legislature could adopt this same approach but to date the SOS has not sponsored such legislation.

April 6, 2009

4. Improved Oversight by the SOS

Despite the expenditure of approximately \$2 million for a "top to bottom review," the SOS testing process failed to address system weaknesses known to veteran administrators and technical staff. One example was the so-called "double-bubble" issue with the Ink-a-Vote system and another was the "zero deck" issue with the Premier system. More thorough, defined, and practical testing, in concert with election technicians and administrators, could help to identify and correct these issues before they create problems for county users. Such constant, cooperative attempts to identify and resolve errors could contribute significantly to voter confidence in the accuracy and integrity of the elections process.

The County of San Diego respectfully requests the rejection of these proposed regulations and pledges to continue working with the SOS to find mutually acceptable and beneficial ways to improve the accuracy, integrity, and efficiency of our elections.

Sincerely,



DEBORAH SEILER

Registrar of Voters

cc: Jennie Bretschneider

Attachment

February 27, 2009

Honorable Debra Bowen
Secretary of State
1500 11th Street
Sacramento, CA 95814

Dear Secretary Bowen:

In light of your statements concerning the status of the Post Election Manual Tally (PEMT) made during last week's conference call, (specifically, your intent to have information out to counties within the next couple of weeks), we, as individual members of the PEMT Working Group feel it is imperative that we share with you our concerns. While we do not speak for the PEMT Working Group as a whole, we, the undersigned, have a growing level of uneasiness regarding the level of progress made to date in revising the PEMT regulations, and certainly with the cancellation of the last three scheduled PEMT conference calls.

We sincerely appreciate the opportunity to work with you and your staff in an attempt to refine the objectives and methodology of the Post Election Manual Tally. We consider providing the practical and logistical challenges of complying with the proposed regulations to be our top priority. Jennie Bretschneider has done an admirable job of listening to our concerns and carrying them back for consideration. We feel confident that there is now a greater understanding of the issues surrounding the emergency regulations, and we understand that some compromise is under consideration. To that end, some degree of progress has been made; however, at this advanced stage into the process we do not believe that the primary issue, that of defining the objective of the PEMT, has been addressed. On the very first conference call, election officials agreed that without defining the objective, it was impossible to develop a meaningful and workable solution.

Instead, two objectives were presented in regard to the PEMT – those being: 1) verifying that the voting equipment is counting votes as designed; and 2) ensuring that the outcome of the election is accurate in close contests. These are very different and separate issues, and it is our position that both objectives cannot be attained using the same methodology.

The first objective can be achieved by hand tallying a statistical sampling of the machine tallied votes (interpreting the marks as would the machine), and comparing the results of the two counts. This can be done using election night results and as such, is the intent of the current 1% (plus) manual tally statute. The percentage by which a contest is decided should have no bearing on this verification procedure. We readily concede that we do not have the expertise to determine whether the current verification levels are sufficient, but we note that the number of precincts exceeds 1% due to the long-standing requirement to add precincts for any contests not included in the original drawing. In addition, new legislation which became effective in 2007 requires elections officials to include mail ballots as well as polls ballots. For most counties, this has effectively doubled the number of ballots included in the 1% manual tally.

The second objective requires a much different approach. First, it is imperative that final, certified results be considered. Election night results bear little resemblance to final results, and many contests that are close on election night, have distinct margins at the final canvass. Conversely, some contests that are not considered close on election night, narrow the margins by the official canvass, and could benefit by a closer look at the ballots cast. This is particularly

Honorable Debra Bowen, Secretary of State

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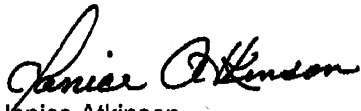
February 27, 2009

true in the case of multi-county contests which can only be considered when all jurisdictions' votes have been reported. This objective is best achieved by a post canvass automatic recount for contests within a certain percentage of difference of votes cast (adjusted of course for varying percentages required for passage). An automatic recount would take into account voter intent, which is not recognized in the verification of the voting system tally. Perhaps statisticians should be consulted to determine whether a statistical sampling is sufficient, or whether a full, automatic recount is required to verify the accuracy of the vote count.

We have tried to make clear that it is not possible to achieve both objectives employing the same methodology. Further, regardless of the objective(s) to be achieved, it must be recognized that there is a significant cost to either or both, depending on the size of the jurisdiction(s) of the contest(s) under scrutiny and the percentage of ballots to be tallied. In these difficult financial times, it is impossible for counties to absorb these costs without state reimbursement – and, in light of recent state positions concerning reimbursement of prior state mandates, we feel it is only appropriate that we apprise you of our opposition to additional unfunded mandates.

Thank you for your consideration of our concerns. Again, we appreciate the opportunity to work with you and your staff in this regard. If you have any questions in this regard please feel free to contact any of the members of the PEMT Working Group listed below.

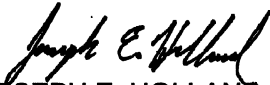
Very truly yours,



Janice Atkinson
Clerk-Recorder-Assessor-Registrar of Voters
County of Sonoma



Cathy Darling
County Clerk/Registrar of Voters
Shasta County



JOSEPH E. HOLLAND
County Clerk/Registrar of Voters
Santa Barbara County



GAIL L. PELLERIN
County Clerk
Santa Cruz County



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